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5 IN THE UNITED STATES DISTRICT COURT
6 FOR THE NORTHERN DISTRICT OF CALIFORNIA

7
8 THEODORE TARVER JR., No. C 08-03500 SI

9 Plaintiff,

10 v.

11 CITY OF SAN FRANCISCO, *et al.*,

12 Defendants.

13
14 **ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT
and DENYING PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT**

15 On September 11, 2009, the Court heard oral argument on the parties' cross-motions for
16 summary judgment. Having considered the arguments of the parties and the papers submitted, and for
17 good cause shown, defendant's motion for summary judgment is GRANTED and plaintiff's motion is
DENIED.

18
19 **BACKGROUND**

20 Plaintiff Theodore Tarver, Jr. alleges that the City and County of San Francisco and the San
21 Francisco Police Department ("SFPD") (collectively, "defendant" or "City") discriminated against him
22 for having a physical disability and retaliated against him based on (1) a previous lawsuit and judgment
23 he won against defendant, and (2) several complaints he made about SFPD's treatment of him during
24 the rehiring process. This lawsuit centers on a series of events described in roughly chronological order.
25 Disputes between the parties as to underlying facts are noted.

26
27 **1. Plaintiff's Employment History with the SFPD**

28 Plaintiff worked as a San Francisco Police Officer from July 30, 1984 until his resignation in

1 June 2001. Tarver Decl. ¶¶ 2, 12 [Docket No. 48]. He received over fifty commendations for his
2 performance as a police officer. *Id.* ¶ 4. During his employment with SFPD, he injured his back several
3 times in the line of duty. In 1992, plaintiff went on light duty status in order to allow his back to heal;
4 in 1998, he underwent surgery and extensive rehabilitation. His doctor told him his back would take
5 approximately three years to heal. *Id.* ¶¶ 6-8, 11-12. SFPD advised plaintiff he was not eligible for
6 disability retirement. However, plaintiff believed that if he temporarily resigned with satisfactory
7 service, the Civil Service Commission Rules allowed him up to two years to return to work with full
8 reinstatement. *Id.* ¶ 13; see Civil Service Commission Rules (2000), 214 Article IV, Reappointment,
9 Rules 214.16.2-3. According to plaintiff, he resigned in June 2001 because he wanted to work on getting
10 healthy and because SFPD denied his requests for work that involved less bending and for a chair
11 offering more back support. Tarver Decl. ¶ 12.

12

13 **2. Plaintiff's Application for Reinstatement with the SFPD and Initiation of Prior Suit**

14 In February 2002, eight months after plaintiff's resignation, his doctor determined he was fit to
15 return to full duty at work. *Id.* ¶ 14. Plaintiff sought reinstatement to a Patrol Officer position. He
16 underwent a medical examination with Dr. Sokolowsky, SFPD's physician. *Id.* ¶ 13-15, 18. Dr.
17 Sokolowsky found that plaintiff's back injuries precluded him from performing essential functions of
18 his job, including standing without rest for ten hours. *Id.* ¶ 16-19. On September 24, 2002, SFPD sent
19 plaintiff a letter stating that the doctor concluded he was medically disqualified from serving as an SFPD
20 police officer. SFPD Letter Re: Reinstatement Application, ex. A [Docket No. 37].

21 In July 2002, plaintiff sued the City in state court for six causes of action based on SFPD's
22 rejection of his reinstatement application. Complaint in *Tarver v. San Francisco*, SF Sup. Ct. No.
23 410-499, ex. B [Docket No. 32-1]. Plaintiff alleged violations of the Fair Employment and Housing Act
24 ("FEHA") for physical disability discrimination, failure to accommodate, failure to prevent
25 discrimination, retaliation, violations of the California Family Care and Medical Leave Act, and refusal
26 to conduct a good faith interactive process. *Id.* at 3-8. The City filed a motion for summary judgment
27 and the court ruled in its favor. App. Opinion in *Tarver v. San Francisco*, No. A104171 (Cal. App. Dec.
28 6, 2004), ex. C, at 1884 [Docket No. 32-1]. Plaintiff appealed. The First District Appellate Court

1 affirmed the lower court on three of plaintiff's causes of action, and reversed with regard to the claims
2 of physical disability discrimination, failure to accommodate, and failure to prevent discrimination. *Id.*
3 at 1890-1905.

4 In February 2006, the remaining claims were tried before a jury. *See Tarver v. San Francisco*,
5 et al., SF Sup. Ct. No. 410499, ex. A, p. 1 [Docket No. 32-1]. On March 1, 2006, the jury returned a
6 verdict for the City on the disability discrimination claim, concluding that plaintiff could not perform
7 essential functions of his position with or without reasonable accommodations. *Id.* at 2. The jury
8 returned a verdict in favor of plaintiff on the claims of failure to accommodate and failure to prevent
9 discrimination, finding that defendant failed to provide a reasonable accommodation for plaintiff's back
10 condition and failed to take all reasonable steps necessary to prevent physical disability discrimination.¹
11 *Id.* at 3-4. The jury awarded plaintiff economic damages in the amount of \$428,450. Judgment was
12 entered on that verdict on April 26, 2006. *Id.* at 1.

13

14 **3. SFPD's Lateral Hiring Process and Plaintiff's Application for Lateral Position**

15 After resolving the prior lawsuit, plaintiff reapplied to SFPD as a "lateral hire." Tarver Decl.
16 ¶24. SFPD's Lateral Hiring Program allows qualified officers to transfer in at a higher level of service,
17 with a higher salary, a shorter training period, and greater promotional opportunities. SFPD Career
18 Website ("SFPD Website"), ex. Q [Docket No. 48-1]; Gaffud Depo., ex. D, p. 14:19-24 [Docket No.
19 29-2]. Lateral applicants are also exempt from the written entry examination. Gaffud Depo. at 18:2-3.
20 The parties dispute the requirements necessary to apply for a lateral police officer position with the
21 SFPD. According to defendant, lateral applicants must have (1) two years of prior active patrol
22 experience, (2) a valid Peace Officers Standards and Training (POST) certificate, and (3) current
23 employment as a police officer or peace officer. *Id.* at 16:4-20, 29:5-7. Plaintiff agrees that the first two
24 qualifications are required but asserts, based on his personal observations, that SFPD does not typically
25 require lateral applicants to have current employment as police or peace officers. Tarver Decl. ¶ 32.

26

27 ¹ The Court notes that the jury's findings with respect to disability discrimination and failure to
28 accommodate appear on their face to be inconsistent. The parties brought numerous post-trial motions
challenging the inconsistent verdict, but eventually settled, so the inconsistency was never resolved.

1 The parties do not dispute that plaintiff satisfied the first two requirements.

2 On May 24, 2007, plaintiff sent an email to Officer Edwin Gaffud, SFPD's lateral recruiter,
3 requesting an application packet for a lateral peace officer position. *Id.* ¶ 28. Gaffud never received
4 plaintiff's email, but acknowledged that plaintiff sent the email to the correct email address. Gaffud
5 Depo. at 27:8-15. Plaintiff called to follow up on the email approximately every two weeks from June
6 to August 2007 and left at least four telephone messages, but received no response. Tarver Decl. ¶ 29-
7 30.

8 In September 2007, plaintiff went to the Background Investigation Unit of the Hall of Justice
9 and spoke to Gaffud about lateral applications. Gaffud Depo. at 25:5-21; Tarver Decl. ¶ 31. Plaintiff
10 told Gaffud he had called and emailed SFPD numerous times to request an application, but had not
11 received a response. *Id.* at 26:19-24. He told Gaffud he believed SFPD's failure to respond was in
12 retaliation for his previous lawsuit. Tarver Decl. ¶ 31. Gaffud told plaintiff he had not received his
13 messages or emails. Gaffud Depo. at 28:9-10. Gaffud stated in his deposition that he asked plaintiff
14 for his name and that plaintiff responded by stating his name and saying he used to work for the SFPD.
15 According to Gaffud, plaintiff stated that it was Police Chief Heather Fong's fault that he lost his job.
16 *Id.* at 28:2-6. Plaintiff disputes this testimony.² Tarver Decl. ¶ 32.

17 Gaffud then told plaintiff he needed to be actively employed as a peace officer with two years
18 of patrol experience in order to apply as a lateral. Gaffud Depo. at 29:5-7. When Gaffud asked plaintiff
19 if he was actively employed as a peace officer, plaintiff replied that until recently, he had been employed
20 a Park Ranger. *Id.* at 29:8-12. Gaffud told him he did not "qualify as a lateral" since he had left his
21 position as a Park Ranger. Tarver Decl. ¶ 32. Gaffud told plaintiff he would not be received back as
22 a lateral and would have to start as an entry-level officer. *Id.* According to plaintiff, he concluded at
23 that point that Gaffud was lying about the requirements in order to discourage his application. *Id.*

24 Gaffud testified that he did not know about plaintiff's prior lawsuit against the City when he
25 spoke to plaintiff. He stated he first learned plaintiff had sued the city and received damages
26 approximately two weeks after plaintiff came into his office. Gaffud Depo. at 37:1-23. He also testified

28 ² Plaintiff's declaration only states that this was not his response. It does not specify what his
29 response actually was or whether Gaffud even asked him for his name.

1 that plaintiff's name came up during two subsequent conversations in the office about a week or two
2 later. *Id.* at 42:2-44:22. In these conversations, people mentioned the fact that plaintiff had sued the
3 police department, received money, and left the department. *Id.* at 42:2-7, 44:14-21. Plaintiff claims
4 Gaffud knew about his prior lawsuit before plaintiff spoke with Gaffud, but provides no evidence in
5 support of this allegation.

6 On November 5, 2007, plaintiff wrote a letter to the SFPD Lateral Transfer Unit asserting that
7 the "continued lack of communication in unanswered e-mails and phone calls [was] . . . due in large part
8 to my having successfully secured a jury verdict of \$428,000 against the SFPD." Tarver Letter to SFPD,
9 ex. C [Docket No. 48]. He requested that SFPD contact him immediately regarding his lateral transfer
10 application. *Id.* On January 2, 2008, plaintiff sent a letter by registered mail to Police Chief Fong,
11 stating that he had tried to contact the SFPD several times regarding his interest in a lateral hire position,
12 but had received no response. Tarver Letter to Fong, ex. D [Docket No. 48]. Plaintiff stated, "[S]ome
13 members of the department have created a wall to block my return." *Id.* Plaintiff stated he would like
14 to "return to work as a police officer . . . without fear of retaliatory actions by the San Francisco Police
15 Department." *Id.* He requested that Chief Fong inform him of how he could get his application heard
16 and what was needed to allow him to return to SFPD. *Id.*

17 On January 23, 2008, Sergeant Trenia Wearing in the Recruitment Unit sent plaintiff a letter
18 responding to his letter to Police Chief Fong. Wearing Letter dated 1/23/2008, ex. E [Docket No. 48].
19 Wearing's letter directed plaintiff to SFPD recruitment websites that described the lateral application
20 process. *Id.* The letter did not address plaintiff's concerns regarding retaliation and discrimination.
21 Tarver Decl. ¶ 36.

22 On January 29, 2008, plaintiff filed a charge with the EEOC, alleging that SFPD had
23 discriminated against him on the basis of his disability and retaliated against him for engaging in
24 protected activity. *Id.* ¶ 38. At the time, he had not yet submitted an application to return to SFPD.
25 Tarver Depo. at 83:16-19. Plaintiff asserts that he had attempted to submit an application, but could not
26 get anybody to communicate with him. *Id.* at 83:4-12. He received his right to sue letter from the
27 EEOC on February 5, 2008. Rt. to Sue Letter, ex. F [Docket No. 48].

28

1 **4. SFPD's Entry-Level Hiring Process and Plaintiff's Application for an Entry-Level Position**

2 Shortly after plaintiff received his right to sue letter, he applied for an entry-level position with
3 SFPD. To apply for an entry-level police officer position, applicants without a valid POST certificate
4 must take the entry-level battery test. Lo Depo., ex. C, p. 10:17-11:6 [Docket No. 42]. Applicants must
5 also complete a Personnel History Questionnaire ("PHQ"), a departmental interview, a physical ability
6 test, a background investigation, a medical examination, a visual acuity examination, a psychological
7 screening, and a polygraph test. *See* ex. K to Tarver Depo. excerpts attached as ex. B [Docket No. 42];
8 Letter from SF Dept. of Hum. Res. dated 2/28/2008 ("HR Letter 1"), ex. L to Tarver Depo. excerpts
9 attached as ex. B [Docket No. 42].

10 **A. Written Exam and PHQ**

11 On February 6, 2008, plaintiff received a letter from Sergeant Wearing informing him that the
12 next written examination was scheduled for February 19, 2008. Wearing Letter dated 2/6/2008, ex. G
13 [Docket No. 48]. The letter further stated that plaintiff could bring his current POST certificate with
14 him to the examination site to waive the written component. *Id.* Plaintiff attended the test site and
15 presented his POST certificate, and was granted a waiver from the written exam requirement; he filled
16 out the PHQ while he was there. HR Letter 1; Tarver Decl. ¶ 40. On February 28, 2008, the San
17 Francisco Department of Human Resources notified him that he had been placed on the "Police Officer
18 Tentative Eligible List." *Id.* On March 13, 2008, plaintiff received another letter from Human
19 Resources, stating that due to plaintiff's responses on the PHQ, it was unlikely he would pass the
20 background investigation. Letter from SF Dept. of Hum. Res. dated 3/13/2008 ("HR Letter 2"), ex. H
21 [Docket No. 48]. Human Resources informed plaintiff it was in his best interest to withdraw his
22 application, but stated that he was not completely eliminated from further consideration. HR Letter 2.
23 Plaintiff could choose to continue with his application and attend his departmental interview and
24 physical ability exam. *Id.* If he passed the interview and exam, his name would be forwarded to the
25 Background Unit and he would have the opportunity to provide further written explanation of his PHQ
26 responses. *Id.*

27 Plaintiff ultimately failed the PHQ by incurring more than 13 "problem points." Roberts Decl.,

¶ 16 [Docket No. 43]; Tarver Problem File, ex. B to Roberts Decl. “Problem points” have implications for the potential success of an applicant for a law enforcement position. Roberts Decl. ¶ 16. POST mandates that applicants must be investigated in the category of “Stress Tolerance.” *Id.* According to POST, evidence that an applicant is lacking in stress tolerance can include multiple personal bankruptcies, mounting debts, evasion of creditors, past due accounts, failure to meet financial obligations, and failure to exercise fiscal responsibility commensurate with income. *Id.* Plaintiff admitted on his PHQ that he had taken money from a company where he worked, declared both Chapter 7 and Chapter 13 bankruptcies, and had checks returned for insufficient funds more than twenty times.³ *Id.* Plaintiff accumulated nine problem points for these financial issues. *Id.* POST also requires agencies to assess an applicant’s “Impulse/Anger Control”; evidence an applicant is lacking in impulse/anger control includes any act of domestic violence as an adult, verbal or physical abuse or violence toward others, or commission of a violent assault. Roberts Decl. ¶ 16. Plaintiff admitted to having slapped or punched a spouse, and incurred three problem points for this conduct. *Id.* Plaintiff also incurred problem points for having resigned to avoid being fired and for being rejected as a job applicant due to issues raised by a background investigation. *Id.*

B. Physical Ability Test and Departmental Interview

Plaintiff elected to continue the application process. On March 27 and 29, 2008, respectively, plaintiff took and passed the physical ability and oral board tests. Tarver Decl. ¶ 42. On March 31, 2008, Human Resources wrote him a letter stating that the interview panel recommended that he continue with the selection process. Letter from SF Dept. of Hum. Res. dated 3/31/2008 (“HR Letter 3”), ex. I [Docket No. 48]. The letter also stated that plaintiff would remain “under waiver” on the

³ Plaintiff’s counsel asserted at oral argument that each of these seemingly negative responses on the PHQ could be explained (for example, counsel stated that plaintiff mistakenly interpreted the term “bounced check” as including overdrafts, and stated that plaintiff’s bankruptcy was due to the cost of litigating his prior suit against the City), and faulted defendant for failing to provide plaintiff an opportunity to explain his responses. However, Sgt. Juarez testified that in a June 12, 2008 telephone call she advised plaintiff, among other things, to call her back to discuss the issues on his failed PHQ (Juarez Depo., at 80, 82, 93) and it is undisputed that plaintiff never did call her back (Tarver Depo. at 182). Indeed, the instant lawsuit had already been filed in state court several days before the June 12, 2008 phone call.

1 Eligible List until he successfully completed the background investigation, medical exam, visual acuity
2 exam, psychological screening, and polygraph.

3

4 **C. Personal History Statement**

5 On April 17, 2008, plaintiff received a Personal History Statement (“PHS”) packet from SFPD
6 and was told to complete and submit it by April 18, 2008. *Id.* ¶ 44; PHS packet, ex. J [Docket No. 48].
7 As part of the PHS, plaintiff was required to list his height and weight. Tarver Decl. ¶ 45. Since he did
8 not have a scale or measuring tape, he wrote down the measurements on his driver’s license without
9 confirming whether they were still accurate. *Id.* Plaintiff did not list the dates of his prior employment
10 with SFPD in the section for employment history. *Id.* ¶ 48. Plaintiff also did not initial or sign the PHS.
11 PHS at DEF 0074. Shortly after plaintiff returned the PHS, an SFPD employee cancelled his scheduled
12 background investigation interview and told plaintiff he would be contacted by an officer in the
13 Background Investigation Unit. Tarver Letter dated 5/23/2008, ex. L [Docket No. 48-1].

14 On May 23, 2008, plaintiff sent a letter to SFPD inquiring about the status of his employment
15 application and the reason for the delay in conducting his background exam. *Id.* He also stated that he
16 was concerned SFPD’s actions were discriminatory and retaliatory. *Id.* Plaintiff sent an email to the
17 Background Section on June 9, 2008, again inquiring about the status of his application. Tarver Email
18 dated 6/5/2008, ex. M [Docket No. 48-1]. Background investigator Yulanda Williams responded to
19 plaintiff’s email and informed him that she would pass his inquiry on to Sergeants Dennis Callaghan and
20 Martha Juarez. Williams Email dated 6/5/2008, ex. M [Docket No. 48-1]. At this time, plaintiff filed
21 federal and state law discrimination claims in California state court.

22 On June 12, 2008, Sergeant Martha Juarez from the Background Investigation Unit called
23 plaintiff and told him he could not move forward with his application because he was over the weight
24 limit and because his PHS was incomplete. Tarver Decl. ¶ 47; Tarver Depo. at 98:12-16. Plaintiff
25 reported on his PHS that he was 5’8” tall and weighed 200 lbs. PHS at DEF 0052. The weight
26 limitation for a 5’8” male applying to SFPD is 183 lbs. Select Process under “Step 8.” Plaintiff asked
27 Juarez about alternative options to the height/weight requirement, such as a body fat percentage
28 analysis, but Juarez did not offer any information regarding alternatives. *Id.* at 50. Juarez advised

1 plaintiff to lose weight and complete a new PHS, at which time they could discuss plaintiff's responses
2 to the questions on his PHQ. Juarez Depo. at 80:14-21.

3 Juarez also told plaintiff that his work history was incomplete because he did not include his
4 prior SFPD employment on his PHS. Tarver Decl. ¶ 48. Plaintiff replied that the missing information
5 could be found in his SFPD personnel history file. *Id.* After this conversation, plaintiff did not file a
6 new PHS or call Juarez again. Plaintiff was never asked to explain the PHQ responses that prompted
7 his problem points, and never did so. Tarver Decl. ¶ 54.

8 The parties dispute whether plaintiff is still on an active potential hire list. Juarez testified that
9 plaintiff's file is in a file cabinet and has not gone to long-term storage because "it's still an open list."
10 Juarez Depo. at 137:4-22. Plaintiff asserts that Juarez medically disqualified him based on his failure
11 to meet the weight requirement. Tarver Decl. ¶ 50. However, plaintiff has never received a written
12 rejection letter from SFPD. Tarver Depo. at 138:21-24.

13

14 **LEGAL STANDARD**

15 Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and
16 admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any
17 material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P.
18 56(c). The moving party bears the initial burden of demonstrating the absence of a genuine issue of
19 material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The moving party, however, has
20 no burden to negate or disprove matters on which the non-moving party will have the burden of proof
21 at trial. The moving party need only demonstrate to the Court that there is an absence of evidence to
22 support the non-moving party's case. *See id.* at 325.

23 The burden then shifts to the non-moving party to "designate 'specific facts showing that there
24 is a genuine issue for trial.'" *Id.* at 324 (quoting Fed. R. Civ. P. 56(e)). To carry this burden, the
25 non-moving party must "do more than simply show that there is some metaphysical doubt as to the
26 material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).
27 "The mere existence of a scintilla of evidence . . . will be insufficient; there must be evidence on which
28 the jury could reasonably find for the [non-moving party]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S.

1 242, 252 (1986).

2 In deciding a summary judgment motion, the evidence is viewed in the light most favorable to
3 the non-moving party, and all justifiable inferences are to be drawn in its favor. *Id.* at 255. “Credibility
4 determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts
5 are jury functions, not those of a judge [when she] is ruling on a motion for summary judgment.” *Id.*
6 The evidence presented by the parties must be admissible. Fed. R. Civ. P. 56(e). Conclusory,
7 speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and
8 defeat summary judgment. *Thornhill Publ’g Co., Inc. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979).

9

10 DISCUSSION

11 **1. Retaliation Claim**

12 In his first, second and third causes of action, brought under Title VII and the FEHA, plaintiff
13 claims the City failed to rehire him as a police officer because of his prior lawsuit and judgment against
14 the City, and that this amounted to illegal retaliation. Both parties now move for summary judgment
15 on this claim. The City asserts that plaintiff cannot meet his burden of showing a *prima facie* case of
16 retaliation, and that, even if he could, he cannot demonstrate that the City’s proffered reasons for its
17 actions were a mere pretext. Plaintiff contends he has established as a matter of law that the City
18 unlawfully retaliated against him by engaging in “discriminatory rejection” of his employment
19 application.

20 In retaliation cases, the Court applies the three-step analysis set forth by the Supreme Court in
21 *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The first step requires the plaintiff to make
22 out a *prima facie* case of retaliation by showing: “(1) involvement in protected activity opposing an
23 unlawful employment practice, (2) an adverse employment action, and (3) a causal link between the
24 protected activity and the adverse action.” *Freitag v. Ayers*, 468 F.3d 528, 541 (9th Cir. 2006). The
25 burden then shifts to the employer to articulate a legitimate, non-discriminatory reason for the adverse
26 employment decision. *McDonnell Douglas*, 411 U.S. at 802. Finally, the burden shifts back to the
27 plaintiff to show that the employer’s proffered explanation is merely a pretext for a discriminatory
28 motive. *Id.* at 804.

1 Defendant does not dispute that plaintiff's prior lawsuit and the discrimination complaints filed
2 in this case were protected activities, satisfying the first prong of the prima facie showing of retaliation.
3 The primary dispute between the parties centers on whether plaintiff can meet the latter two prongs of
4 the prima facie showing, and if so, whether defendant had a valid, non-pretextual reason for failing to
5 hire plaintiff. The Court concludes as a matter of law that plaintiff cannot make out a prima facie case
6 of retaliation. Even assuming that defendant's actions with respect to plaintiff's lateral hire application
7 and entry-level application constituted adverse employment actions, plaintiff cannot satisfy his burden
8 of showing a causal link between his protected activities and those adverse actions.

9 Plaintiff asserts that Gaffud retaliated against plaintiff for plaintiff's prior lawsuit, by failing to
10 respond to plaintiff's 2007 request for information regarding the lateral hire process, and then by
11 providing plaintiff with misinformation to dissuade him from submitting an application. However, it
12 is uncontested that Gaffud, the sole officer in charge of lateral recruiting, did not know about plaintiff's
13 prior lawsuit until after his interactions with plaintiff had taken place. Gaffud first learned of plaintiff's
14 prior suit for damages approximately two weeks after plaintiff came into Gaffud's office to inquire about
15 lateral hire applications. Plaintiff's conclusory, unsupported assertions to the contrary⁴ are not sufficient
16 to create a genuine issue of fact for trial. *See Thornhill*, 594 F.2d at 738 (conclusory testimony in an
17 affidavit is insufficient to defeat summary judgment).

18 With respect to plaintiff's 2008 application for an entry-level officer position, submitted several
19 months after his discrimination complaint regarding SFPD's handling of his lateral hire inquiries, the
20 City has established as a matter of law that SFPD did not cause plaintiff's application to be rejected.
21 The City was not the cause of plaintiff's inability to meet the weight requirement, his incomplete PHS,
22 or the problem points accrued on plaintiff's PHQ. Moreover, although plaintiff challenges the propriety
23 of the PHQ's questions and the method of calculating PHQ scores, he does not dispute that the test was

24 ⁴ When asked at oral argument to identify any facts suggesting that Gaffud knew of the lawsuit
25 prior to the September 2007 meeting, counsel pointed to deposition testimony by Capt. Schmitt,
26 concerning a conversation Capt. Schmitt had with Sgt. Callaghan, concerning plaintiff's lateral
27 application. *See* Schmitt Depo., ex. F, p. 59-60 [Docket No. 29-2]. That conversation, however, clearly
28 took place after plaintiff had gone to see Gaffud in September. Capt. Schmitt recalled that Callaghan
was "letting me know that that [plaintiff's visit to Gaffud] had happened and asked for direction. And
I said, 'Well, it has to be handled like any other lateral application.'" *Id.* This does not support an
inference that Gaffud knew about plaintiff's lawsuit before the September 2007 meeting.

1 formulated by and is scored by an outside agency, not SFPD, and that defendant therefore could not
2 have manipulated plaintiff's score in retaliation for his prior lawsuit or his more recent discrimination
3 complaint. Plaintiff faults SFPD for failing to give him an opportunity to explain his negative responses
4 to the questions on his PHQ. Plaintiff ignores the fact that during his last conversation with Sergeant
5 Juarez, he was told to resubmit a completed PHS, at which point Juarez would discuss plaintiff's PHQ
6 responses with him. Moreover, plaintiff's application has never actually been rejected.

7 In sum, plaintiff presents no evidence that would permit a jury to determine that the application
8 requirements were applied to him in a retaliatory manner. The City's motion for summary judgment
9 is therefore GRANTED with respect to the retaliation claim.

10

11 **2. Physical Disability Discrimination Claim**

12 In plaintiff's fourth, fifth, and sixth causes of action, he claims the City engaged in physical
13 disability discrimination against him, in violation of the ADA, 42 U.S.C. § 12101 *et seq.*, and FEHA,
14 Cal. Gov. Code § 12940(a). Plaintiff asserts that although he did not consider himself to be disabled
15 when he sought employment with SFPD in 2007 and 2008, the City discriminated against him because
16 it regarded him as disabled. *See Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 521-22 (1999) ("[A]
17 person is 'regarded as' disabled within the meaning of the ADA if a covered entity mistakenly believes
18 that the person's actual, nonlimiting impairment substantially limits one or more major life activities.").

19 Both ADA and FEHA discrimination claims are assessed using the three-step *McDonnell*
20 *Douglas* framework discussed previously. *See McDonnell Douglas*, 411 U.S. at 802. A prima facie
21 showing of disability discrimination requires the plaintiff to demonstrate: (1) that the plaintiff suffers
22 from a disability; (2) that the plaintiff is otherwise qualified to do his job; and (3) that the plaintiff
23 suffered an adverse employment action because of his disability. *Zivkovic v. So. Cal. Edison Co.*, 302
24 F.3d 1080, 1090 (9th Cir. 2002); *Faust v. Cal. Portland Cement Co.*, 58 Cal. Rptr. 3d 729, 745 (Cal. Ct.
25 App. 2007). To meet the first prong of the prima facie showing, a plaintiff bringing a "regarded as"
26 disabled claim must "provide evidence of the employer's 'misperception,' or subjective belief that the
27 plaintiff is substantially impaired . . . and provide evidence that the employer subjectively believes that
28 the plaintiff is substantially limited in a major life activity." *Walton v. U.S. Marshals Serv.*, 492 F.3d

1 998, 1006 (9th Cir. 2007).

2

3 **A. Preclusive Effect of Prior State Court Judgment**

4 Defendant asserts, as a preliminary matter, that plaintiff is collaterally estopped from relitigating
5 the second prong of his *prima facie* showing—whether he is otherwise qualified to do his job—because
6 the jury in plaintiff’s prior lawsuit found that he could not perform the essential functions of the police
7 officer position with or without a reasonable accommodation.

8 As defined under California law, collateral estoppel “precludes relitigation of issues argued and
9 decided in prior proceedings.” *Lucido v. Superior Court*, 51 Cal. 3d 335, 341 (1990). The doctrine
10 applies if: (1) an issue raised in a present action is identical to an issue litigated and decided in a prior
11 proceeding; (2) the prior proceeding resulted in a final judgment on the merits; and (3) the party against
12 whom issue preclusion is asserted was a party or in privity with a party to the prior proceeding.”
13 *Brinton v. Bankers Pension Servs., Inc.*, 76 Cal. App. 4th 550, 556 (1999).⁵ Under California law,
14 however, a prior judgment lacks preclusive effect “if there are changed conditions and new facts which
15 were not in existence at the time the action was filed upon which the prior judgment is based.”
16 *McGaffey v. Sudowitz*, 189 Cal. App. 2d 215, 218 (1961).

17 Defendant’s contention that the prior state court judgment in the City’s favor carries preclusive
18 effect in this proceeding must fail due to several changes in essential facts. First, the fact that plaintiff
19 was deemed unable to perform the essential functions of the police officer position during the period
20 at issue in his prior action has limited bearing on his ability to perform those functions during the period
21 at issue in this case, given the additional years of healing and rehabilitation time. Second, the entry-
22 level position for which plaintiff applied in 2008 may well involve different job functions than
23 plaintiff’s previous position. Accordingly, the Court will proceed to consider the merits of the parties’
24 arguments concerning plaintiff’s disability discrimination claim.

25

26

27

28 ⁵ In determining the preclusive effect of a state court judgment in federal court, the federal court
must apply the preclusion rules of the state in which the prior judgment was rendered. *Marrese v. Am.
Acad. of Orthopedic Surgeons*, 470 U.S. 373, 379 (1985).

1 **B. Plaintiff's Prima Facie Case of Discrimination**

2 Plaintiff must show, first, that SFPD had a subjective belief that he was disabled and that his
3 impairment resulted in a substantial limitation on his ability to perform a major life activity. *See*
4 *Walton*, 492 F.3d at 1006. Under EEOC regulations, working constitutes a major life activity. *See* 29
5 C.F.R. § 1630.2(I). A plaintiff must show that his employer regarded him as unable to perform "either
6 a class of jobs or a broad range of jobs in various classes as compared to the average person having
7 comparable training, skills and abilities." *Walton*, 492 F.3d at 1009. In other words, "An allegation that
8 the employer regards the impairment as precluding the employee from a single, particular position is
9 insufficient to support a claim that the employer regards the employee as having a substantially limiting
10 impairment." *Id.*

11 Here, plaintiff has submitted no evidence — direct or circumstantial — to show that SFPD
12 regarded him as unable to perform a class or range of jobs at the time plaintiff inquired about the lateral
13 hire position and submitted an application for the entry-level position. Indeed, the only evidence of
14 plaintiff's physical condition during the time period at issue in this case reflects that plaintiff passed the
15 physical ability test administered by SFPD as part of the application process. This fact appears to
16 undermine plaintiff's contention that defendant regarded him as disabled.

17 Because plaintiff has submitted no evidence in support of his contention that defendant regarded
18 him as disabled, and disclaims that he was actually disabled when he applied for employment, there is
19 no genuine dispute of fact for trial on plaintiff's claim of disability discrimination. Defendant's motion
20 for summary judgment on this claim is GRANTED.

21
22 **C. Failure to Prevent Discrimination**

23 Because plaintiff has not shown that the City engaged in disability discrimination, there is no
24 basis for the claim, stated in his seventh cause of action, that the City failed to take all reasonable steps
25 necessary to prevent discrimination. Defendant is entitled to summary judgment on this claim as well.
26 *See Trujillo v. N. Cty. Transit Dist.*, 63 Cal. App. 4th 280, 288-89 (1998) ("Employers should not be
27 held liable to employees for failure to take necessary steps to prevent [discriminatory] conduct, except
28 where the actions took place and were not prevented.").

1 **3. Failure to Engage in an Interactive Process**

2 Plaintiff's eighth cause of action concerns the City's alleged failure to engage in a good-faith
3 interactive process. Contrary to the claim in his summary judgment motion that he was not actually
4 disabled, but merely regarded as such, plaintiff alleges as part of his interactive process claim that he
5 was in fact disabled at the time of the applications in question, and that the City failed to engage in a
6 good-faith process of arriving at a reasonable accommodation for his disability.

7

8 **A. Exhaustion**

9 Defendant's first argument in its motion for summary judgment on this claim is that plaintiff
10 failed to exhaust his administrative remedies because he did not expressly raise the claim in his charge
11 to the Department of Fair Employment and Housing ("DFEH"). A plaintiff alleging employment
12 discrimination must exhaust administrative remedies before filing a Title VII claim by filing a timely
13 charge with the EEOC or the corresponding state agency—in this case, the DFEH. *Freeman v. Oakland*
14 *Unified School Dist.*, 291 F.3d 632, 636 (9th Cir. 2002). Charges of discrimination in an administrative
15 filing should be read with the "utmost liberality," *B.K.B. v. Maui Police Dept.*, 276 F.3d 1091, 1100 (9th
16 Cir. 2002), and a claim is properly exhausted even if not expressly stated in the administrative filing as
17 long as it "can reasonably be expected to grow out of the charge of discrimination," *Freeman*, 291 F.3d
18 at 636. Here, although plaintiff's DFEH filing expressly referred only to disability discrimination and
19 retaliation, the Court finds that the claim for failure to engage in an interactive process could reasonably
20 be expected to grow out of the charges stated. The Court rejects defendant's contention that the claim
21 is unexhausted.

22

23 **B. Merits**

24 The FEHA requires employers to "engage in a timely, good faith, interactive process" with an
25 employee or applicant for employment in order to determine potential reasonable accommodations for
26 known physical or mental disabilities of the employee or applicant, provided the employee or applicant
27 has made a request for a reasonable accommodation for his or her disability. Cal. Gov. Code §
28 12940(n); *see also Avila v. Cont. Airlines, Inc.*, 165 Cal. App. 4th 1237, 1252 (2008) (plaintiff must

1 request a reasonable accommodation from the employer).

2 Plaintiff fails to show that he ever made a request for a reasonable accommodation from the City
3 during the period at issue here. Plaintiff's only argument is that his 2008 job application itself — or,
4 as he terms it, request for "reemployment" — amounted to a request for a reasonable accommodation.
5 The Court disagrees. Under the FEHA, a reasonable accommodation is something that will enable an
6 employee or prospective employee to perform the functions of his or her job. *See* Cal. Gov. Code §
7 12926(n)(1)-(2) (reasonable accommodations may include "[j]ob restructuring, part-time or modified
8 work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices,
9 adjustment or modifications of examinations, training materials or policies, the provision of qualified
10 readers or interpreters, and other similar accommodations for individuals with disabilities."). Under the
11 statutory definition, a job application itself is not a request for a reasonable accommodation.
12 Defendant's motion for summary judgment as to the claim for failure to engage in an interactive process
13 is GRANTED.

14

15 **CONCLUSION**

16 For the foregoing reasons and for good cause shown, the Court hereby GRANTS defendant's
17 motion for summary judgment and DENIES plaintiff's motion for summary judgment. [Docket
18 Nos. 28, 35].

19

20 **IT IS SO ORDERED.**

21 Dated: September 15, 2009



SUSAN ILLSTON
United States District Judge

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